

lower than the rate paid for the non-overtime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. It has been pointed out that, except in limited situations under contracts which qualify under section 7(f), it is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

(c) Where the employee is hired at a low hourly rate supplemented by facilities furnished by the employer, bonuses (other than those excluded under section 7(e)), commissions, pay ostensibly (but not actually) made for idle hours, or the like, his regular rate is not the hourly rate but is the rate determined by dividing his total compensation from all these sources in any workweek by the number of hours worked in the week. Payment of overtime compensation based on the hourly rate alone in such a situation would not meet the overtime requirements of the Act.

(d) One scheme to evade the full penalty of the Act was that of setting an arbitrary low hourly rate upon which overtime compensation at time and one-half would be computed for all hours worked in excess of the applicable maximum hours standard; coupled with this arrangement was a guarantee that if the employee's straight time and overtime compensation, based on this rate, fell short, in any week, of the compensation that would be due on a piece-rate basis of x cents per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it never (or seldom) was operative. This scheme was found by the Supreme Court to be violative of the overtime provisions of the Act in the case of *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 427. The regular rate of the employee involved was found to be the quotient of total piece-rate earnings paid in any week divided by the total hours worked in such week.

(e) The scheme is no better if the employer agrees to pay straight time and overtime compensation on the arbitrary hourly rates and to make up the difference between this total sum and the piece-rate total in the form of a bonus to each employee. (For further discussion of the refinements of this plan, see §§ 778.502 and 778.503.)

§ 778.501 The "split-day" plan.

(a) Another device designed to evade the overtime requirements of the Act was a plan known as the "Poxon" or "split-day" plan. Under this plan the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the "straight time" portion of the day and the other the "overtime" portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as the regular rate: "time and one-half" based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of \$5 per hour under a contract which provides for the payment of so-called "overtime" for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive \$20 for the first 4 hours and \$30 for the remaining 4 hours; and a total of \$50 for 8 hours. (This is exactly what he would receive at the straight time rate of \$6.25 per hour.) On the sixth 8-hour day the employee likewise receives \$50 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at "overtime" rates for 20 hours of the workweek.

(b) Such a division of the normal 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of \$5 an hour and the alleged overtime rate of \$7.50 per hour is not paid for overtime work. It is not geared either to hours "in excess of the employee's normal working hours or regular working hours" (section 7(e)(5) or

for work “outside of the hours established in good faith * * * as the basic, normal, or regular workday” (section 7(e) (7)) and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is \$6.25 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard. This rule was settled by the Supreme Court in the case of *Walling v. Helmerich & Payne*, 323 U.S. 37, and its validity has been reemphasized by the definition of the term “regular rate” in section 7(e) of the Act as amended.

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PSEUDO-BONUSES

§ 778.502 Artificially labeling part of the regular wages a “bonus”.

(a) The term “bonus” is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract.

(b) For example, if an employer has agreed to pay an employee \$300 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the \$300 salary by the number of hours worked in the week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same \$300 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of \$4.80 an hour, overtime compensation at \$7.20 per hour and labels the balance a “bonus” (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this “bonus” by prorating it back over the hours of the workweek. Overtime com-

pensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(1) In the first week the employee whose applicable maximum hours standard is 40 hours, works 40 hours and receives \$300. The books show he has received \$192 (40 hours×\$4.80 an hour) as wages and \$108 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives \$300. The books show he has received \$192 for the first 40 hours and \$36 (5 hours×\$7.20 an hour) for the 5 hours over 40, or a total of \$228 as wages, and the balance as a bonus of \$72. Overtime compensation is then computed by the employer by dividing \$72 by 45 hours to discover the average hourly increase resulting from the bonus—\$1.60 per hour—and half this rate is paid for the 5 overtime hours—\$4. This is improper. The employee’s regular rate in this week is \$6.67 per hour. He is owed \$316.85 not \$304.

(3) In the third week the employee works 50 hours and is paid \$300. The books show that the employee received \$192 for the first 40 hours and \$72 (10 hours×\$7.20 per hour) for the 10 hours over 40, for a total of \$264 and the balance as a bonus of \$36. Overtime pay due on the “bonus” is found to be \$3.60. This is improper. The employee’s regular rate in this week is \$6 and he is owed \$330, not \$303.60.

(d) Similar schemes have been devised for piece-rate employees. The method is the same. An employee is assigned an arbitrary hourly rate (usually the minimum) and it is agreed that his straight-time and overtime earnings will be computed on this rate but that if these earnings do not amount to the sum he would have earned had his earnings been computed on a piece-rate basis of “x” cents per piece, he will be paid the difference as a “bonus.” The subterfuge does not serve to conceal the fact that this employee is actually compensated on a piece-rate basis, that there is no bonus and his regular rate is the quotient of piece-rate earnings divided by hours